

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE: PERRY O. LEMMONS, Debtor.	CASE NO. 00-70964 CHAPTER 7 JUDGE DIEHL
THE ESTATE OF NELLE BOWEN NEWTON, DOROTHY NEWTON LEE and NELLE M. NEWTON (the “NEWTON GROUP”), Plaintiffs, v. PERRY O. LEMMONS, Defendant.	ADVERSARY PROCEEDING NO. 00-6828

ORDER GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the Court on Newton Group’s (“Plaintiff”) Motion for Summary Judgment (“Motion”). Plaintiff seeks a determination that a \$ 1,019,000 judgment debt owed by Perry Lemmons (“Debtor” or “Defendant”) is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (4), and (6). This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(I), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. The Court has considered the pleadings, briefs, and other documents submitted by the parties, as well as oral arguments. For the reasons stated below, the Court concludes that Plaintiff is entitled to summary judgment.

The Plaintiff commenced this adversary proceeding on November 24, 2000, by filing a complaint contending that a August 2, 2000 judgment entered against Debtor, issued by the Superior Court of Fulton County, in the amount of \$1,019,000, predicated on claims of fraud, conversion, and breach of fiduciary duty, should be determinative in establishing nondischargeability pursuant to 11 U.S.C. §§ 523(a)(2)(A), (4), and (6). Plaintiff filed its Motion for Summary Judgment on August 19, 2005. On September 12, 2005, Defendant filed his response to the Motion. On October 3, 2005, pursuant to an order granting an extension of time, Plaintiff filed its reply. Subsequently, the Court requested the parties submit supplemental briefs on certain issues. The parties filed their respective supplemental materials on December 2, 2005. A hearing was held on December 5, 2005.

Facts

This adversary proceeding arises from a pre-petition judgment against Debtor in Superior Court of Fulton County Georgia, Civil Action CV-35181 (“the Superior Court Action”). (Plaintiff’s Statement of Undisputed Facts ¶1.¹). The Superior Court Action was initiated by Debtor, who was acting as trustee for the Dewey Bowen Trust, and the co-trustee, James L. Webb, and sought an interpretation of the wills of Dewey Bowen and Ruth Bowen and an accounting. (Plaintiff’s Brief in Support of It’s Motion, 1-2; Plaintiff’s Statement of Undisputed Facts ¶1.). The Newton Group asserted counterclaims for fraud, conversion, and breach of fiduciary duty. (Plaintiff’s Statement of Undisputed Facts ¶1.). The judgment entered on August

¹ In Defendant’s Statement of Material Facts As To Which There Exists A Genuine Issue To Be Tried (Docket No. 28), Defendant admits all of the items set forth in Plaintiff’s Statement of Material Facts (Docket No. 30) except for ¶2 thereof. The only disputes of fact cited by Defendant relate to the jury’s verdict and not to the judgment entered by the Court following that verdict.

2, 2000, was the result of a week long trial ending in a jury verdict in favor of the Newton Group and against Debtor on all claims. (Superior Court Judgment.). The judgment awarded the Newton Group \$758,000 in compensatory damages and \$165,000 in attorney's fees, together with interest at the legal rate of twelve percent (12%) plus costs. (Superior Court Judgment).

Debtor actively participated in the litigation and was at all times represented by counsel. (Plaintiff's Statement of Undisputed Facts ¶3). Debtor's participation included, but was not limited to, calling a number of witnesses to testify on his behalf, testifying on his own behalf, filing various post-trial motions, and seeking an appeal of the judgment. (*Id.* at ¶¶3, 5-12.). Following the trial, on August 17, 2000, Debtor timely submitted a motion seeking to amend the judgment form ("Motion to Amend") and a motion for a new trial and judgment notwithstanding the verdict (the "JNOV Motion"). (*Id.* at ¶5.). On the same day, Debtor filed a chapter 7 bankruptcy petition. (*Id.* at ¶6.). Following an order of the Bankruptcy Court modifying the automatic stay, the Superior Court of Fulton County denied Debtor's Motion to Amend. (*Id.* at ¶¶7-8.). Thereafter, the Bankruptcy Court entered an order lifting the automatic stay to permit the Fulton County Superior Court to rule on Debtor's JNOV Motion and to allow Debtor to timely appeal. (*Id.* at ¶9.). Debtor's JNOV Motion was subsequently denied and his appeal was dismissed. (*Id.* at ¶¶ 9-10.). The Georgia Court of Appeals affirmed the dismissal. (*Id.* at ¶11.).

Standard for the Court to Grant Summary Judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is authorized when all the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In assessing whether a “genuine issue” for trial exists, the court must consider all the evidence and factual inferences reasonably drawn from the evidence in a light most favorable to the non-moving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000). “The party seeking summary judgment bears the initial burden to demonstrate to the district court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts.” *Hairston v. Gainesville Sun Publ’g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh’g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

Conclusions of Law

Plaintiff contends that its claim against Debtor evidenced by the judgment rendered by the Fulton County Superior Court, against Debtor on fraud, conversion, and breach of fiduciary duty satisfies the exceptions to discharge as stated in 11 U.S.C. §§ 523(a)(2)(A), (4) and (6) based upon principles of collateral estoppel. Collateral estoppel serves to prevent the re-litigation of issues previously contested and determined by a valid and final judgment in another court. *HSSM #7 Ltd. Pshp. v. Bilzerian (In re Bilzerian)*, 100 F.3d 886, 892 (11th Cir. 1996); *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 77n. 1, 104 S. Ct. 892, 894n. 1, 79 L. Ed. 2d 56 (1984).

The doctrine of collateral estoppel applies to nondischargeability proceedings. *See Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S. Ct. 654, 658 n.11 (1991); *St. Laurent, II v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 675-76 (11th Cir. 1993). In applying the doctrine of collateral estoppel to a state court judgment, a federal court must accord the judgment the same preclusive effect as it would be given under the law of the state in which the judgment was rendered. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 102 S. Ct. 1833, 72 L. Ed. 2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980); *In re St. Laurent, II*, 991 F.2d 672. Under Georgia law, collateral estoppel applies when there are “(1) identity of parties or their privies; (2) identity of issues; (3) actual and final litigation of the issue in question; (4) essentiality of the adjudication to the earlier action; and (5) full and fair opportunity to litigate the issues in question.” *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 272 (Bankr. N.D. Ga. 2002); *see Kent v. Kent*, 265 Ga. 211 452, S.E.2d 764 (1995).

_____ There is no dispute that the parties in the state court action and the instant adversary proceeding are identical. Accordingly, the Court finds the Superior Court Judgment satisfies the identity of parties prong of the test for collateral estoppel.

Section 523(a)(2)(A) provides that “[a] discharge [in bankruptcy] does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]”

11 U.S.C. § 523(a)(2)(A). A creditor who proves by a preponderance of the evidence: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of

the misrepresentation prevails on a § 523(a)(2)(A) claim. *In re Williams*, 282 B.R. 267. A finding of fraud under Georgia law requires (1) a false representation made by the defendant, (2) which the defendant knew was false, (3) made with an intent to deceive the plaintiff (4) justifiable and detrimental reliance by the plaintiff on such representation, and (5) damages suffered by the plaintiff as a result. *Id.* at 272 (citing *Sterling Factors Inc. v. Whelan*, 245 B.R. 698, 705 (N.D. Ga. 2000)). It is generally accepted that the requirements for fraud under Georgia law are sufficiently identical to those required for a claim under § 523(a)(2)(A) to establish an identity of issues. *Id.* at 272; *Branton v. Hooks (In re Hooks)*, 238 B.R. 880, 884-85 (Bankr. S.D. Ga.1999).

Essentially, Plaintiff argues that the finding of fraud against Debtor in the Superior Court Action should be sufficient to satisfy the dischargeability exception predicated on fraud in the bankruptcy proceeding, as it would apply to the debt owed by Debtor to Plaintiff. Debtor, in his response to Plaintiff's motion for summary judgment, contends that collateral estoppel should not apply in this case because the standard for nondischargeability under § 523(a)(2)(A) requires actual fraud and the jury charge in the Superior Court Action allowed the jury to find Debtor liable on the basis of either constructive or actual fraud. In support of his argument, Debtor points to the section of the jury charge that states "actual fraud implies moral guilt, while construction [sic] fraud may be consistent with innocence." Additionally, the Debtor argues that the charge permitted the jury to find liability for fraud based on a failure to disclose information as opposed to an overt misrepresentation.

When the charge is read in whole, however, it is clear that the jury was instructed that intent to deceive and an overt misrepresentation were required for liability. The jury charge

clearly set out the requirements for finding fraud under Georgia law. Moreover, the charge stated “[t]o return a verdict on the basis of fraud against the defendant you must find moral guilt . . . on the part of the defendant.” The charge further explained that a person has a right of action “if there is a willful misrepresentation of a material fact which was made to induce another person to act and causes that person to act and the person is injured.” Additionally, the charge instructed the jury that “mere concealment of the facts, unless done in the manner to deceive and mislead, will not support an action.” Accordingly, the Court finds an identity of issues exists as to fraud.

Plaintiff also argues that collateral estoppel should apply in this case to establish nondischargeability under § 523(a)(4). Pursuant to § 523(a)(4), a debt for “fraud or defalcation while acting in a fiduciary capacity” is nondischargeable.² 11 U.S.C. § 523(a)(4). Section 523(a)(4) requires that the debtor, acting as a fiduciary in accordance with an express or technical trust that existed prior to the wrongful act, committed an act of fraud or defalcation. *Eavenson v. Ramey (In re Eavenson)*, 243 B.R. 160, 164 (N.D. Ga. 1999). Debtor does not dispute the existence of a fiduciary relationship. Debtor, however, contends that the Superior Court Judgment of fraud does not satisfy the requirements for fraud under § 523(a)(4). As is the case for § 523(a)(2)(A), the standard for fraud in § 523(a)(4) requires an act of moral turpitude or intentional wrong. *See Suntrust Bank v. Roberson, (In re Roberson)*, 231 B.R. 136, 139 (Bankr. S.D. Ga. 1999). For the reasons stated above, the Court finds an identity of issues exists as to the element of fraud.

Alternatively, § 523(a)(4) excepts from discharge a debt for defalcation. *Quaif v.*

² § 523(a)(4) also provides that a debt for embezzlement or larceny is not dischargeable.

Johnson, 4 F.3d 950, 955 (11th Cir. 1993). “Defalcation” refers to the failure to produce funds received in a fiduciary capacity. *Id.* Plaintiff contends that the issues of breach of fiduciary duty and conversion in the Superior Court Action were identical to the issue of defalcation. Debtor, however, argues that the jury instructions on conversion and breach of fiduciary duty did not require a finding that Debtor acted with the level of intent required under § 523(a)(4).

The Courts have struggled with the degree of intent necessary to establish a defalcation. In *Quaif*, the Eleventh Circuit held that while a purely innocent mistake by a fiduciary may be dischargeable, a defalcation does not have to rise to the level of fraud, embezzlement, or misappropriation. *Id.* The jury was instructed that conversion required an “act of dominion wrongfully asserted” over property in denial of the rights of the owner. This comports with the minimal degree of culpability required for § 523(a)(4) defalcation. Thus, identity of issues exists as to conversion.

With regards to breach of fiduciary duty, the jury was instructed, “[b]reach of fiduciary duty may be either innocent or intentional. . . . and the latter will be sufficient to constitute actual fraud.” Based on this Court’s finding, discussed below, that the Superior Court entered its Judgment on all three claims, including fraud, and that the jury instructions required a finding of “actual fraud,” the Court concludes there is also an identity of issues between defalcation and breach of fiduciary duty. The Plaintiff’s claims for fraud and breach of fiduciary duty were based on the same set of facts. The Debtor was found liable for fraud, which required an intentional act. Therefore, the breach of fiduciary duty reflected in the judgment must have resulted from the Debtor’s intentional conduct.

Finally, Plaintiff argues that, because the requirements for conversion under Georgia law may also establish willful and malicious injury by the debtor, the Superior Court Judgment on conversion also establishes the elements for an exception under § 523(a)(6). Section 523(a)(6) excepts from discharge “any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). The Supreme Court held in *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974 978 (1998), that nondischargeability under § 523(a)(6) requires a “deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” Not every act of conversion will be sufficient to establish willful and malicious injury under § 523(a)(6). *Wolfson v. Equine Capital Corp. (In re Wolfson)*, 56 F.3d 52 (11th Cir. 1995); *Rentrak Corp. v. Neal (In re Neal)*, 300 B.R. 86 (Bankr. M.D. Ga. 2003). To prove a willful injury the Plaintiff must show that the Debtor had a subjective motive to inflict injury or believed that his conduct was substantially certain to cause injury. Restatement (Second) of Torts § 8A; *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001); *Bank of Lumber City v. Rowland (In re Rowland)*, 316 B.R. 759, 763-64 (Bankr. S.D. Ga. 2004). There is no indication in the record before the Court that the jury in the Superior Court Action was instructed to consider Debtor’s subjective intent to cause injury or the probability of injury. Therefore, the Court declines to find an identity of issues sufficient to establish nondischargeability pursuant to § 523(a)(6).

Fraud, conversion, and breach of fiduciary duty were all submitted to the jury for determination. Following a week long trial, the jury returned a verdict on all of the issues. A judgment was entered against Debtor as to all claims. Debtor also pursued the case on appeal. The Court finds that the issues in the Superior Court Action were actually and finally litigated.

See Lusk v. Williams (In re Williams), 282 B.R. 267, 272 (Bankr. N.D. Ga. 2002) (“[A]s a general rule, when a question of fact is put in issue by the pleadings, is submitted to the trier of fact for its determination, and is determined, that question of fact has been ‘actually litigated.’”) (quoting 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 132.03[2][c] (3d ed. 1999)).

Debtor argues that the jury could have found him liable only on the claim for breach of fiduciary duty and may have done so without finding the degree of culpability necessary to establish nondischargeability. Debtor further argues that collateral estoppel does not apply because the Superior Court failed to specify on which cause of action he was held liable. The Court finds the Debtor’s arguments unpersuasive. First, the judgment of the Superior Court establishes that the Debtor is liable based upon all three claims. Alternatively, identity of issues exists between each of the claims determined by the Superior Court Judgment and at least one of the nondischargeability provisions under § 523(a). Therefore, even if the Debtor had been found liable only on one of the claims, the debt would be nondischargeable.

Furthermore, while the Eleventh Circuit held in *In re St. Laurent, II*, 991 F.3d 672 , 676 (11th Cir. 1993),³ that collateral estoppel does not apply where the prior judgment failed to apportion damages among multiple claims, the facts of this case are distinguishable. First, the damages in this case were not apportionable. All three claims related to the same misconduct by the Debtor. The damages sought under each claim were identical: recovery of the money

³ The Court held that “[i]f the judgment fails to distinguish as to which of two or more independently adequate grounds is the one relied upon, it is impossible to determine with certainty what issues were in fact adjudicated, and the judgment has no preclusive effect.” *Id.*

misappropriated from the trust, plus attorneys' fees and costs. Each of the three counts merely provided an independent basis for the total judgment. Moreover, the Superior Court Judgment is predicated on all three claims. The judgment states that the case "was tried . . . before a jury of twelve persons on the claims of Plaintiffs for fraud, conversion, breach of fiduciary duty," and that the jury rendered its verdict "for the claims above." Additionally, the Superior Court's Order denying Debtor's Motion to Set Aside the Judgment states "[t]his Court, having presided over the entirety of the jury trial, finds that said Judgment accurately reflects the claims that were presented during the trial of the above-matter and upon which the jury rendered its verdict." Therefore, the Court, finds that the judgment was on all claims, and that each claim was determined by the adjudication of the Superior Court Action.

Finally, the requirement for collateral estoppel that the defendant to an action must have had a full and fair opportunity to litigate the issue in question is rooted in due process concerns. *In re Williams*, 282 B.R. 267. The key to whether a defendant has had full and fair opportunity to contest the issues is to determine whether the party had adequate notice of the issue and was afforded the opportunity to participate in its determination. *Id.* Debtor does not contend that he did not receive notice. Debtor was represented by counsel in the Superior Court Action and actively participated, calling a number of witnesses on his behalf, including testifying himself, filing various post-trial motions, and seeking an appeal of the judgment. Accordingly, the Court finds that Debtor had a full and fair opportunity to litigate the issues in the prior case.

Considering the entire charge to the jury and the judgment entered, the Court finds the Plaintiff has established all the elements of collateral estoppel. There is clear identity of issues between each of the claims and at least one of the exceptions to dischargeability. All the

elements of § 523(a)(2)(A) and § 523(a)(4) were actually and necessarily litigated in the Fulton County Superior Court Action. Furthermore, a finding on each of the claims was essential to the Superior Court Judgment. Finally, Debtor had a full and fair opportunity to litigate the issues in the earlier proceeding. Accordingly, _____

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED, this _____ day of December, 2005.

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

J. Robert Williamson

Scroggins and Williamson
1500 Candler Building
127 Peachtree Street, N.E.
Atlanta, GA 30303

Joseph J. Burton, Jr.

Burton & Armstrong
Suite 1750
Two Ravinia Drive
Atlanta, GA 30346

Michele L. Stumpe

Stumpe & Associates, P.C.
3101 Towercreek Pkwy., Suite 425
Atlanta, GA 30339